(iv) The applicant raised the issue of Free on Board contract in the applicant's submission.

On this issue I note that the applicant had referred to their telex of 17 July 1987 to PORAM admitting that they had contracted on PORAM FOB terms.

I am satisfied that is the answer I would accept and the applicant cannot be heard now to say otherwise.

(v) Under this issue of test conducted improperly, I have already decided on this issue as in item (iii) above and I give the same answer that the test was conducted properly.

(vi) The allegation of the applicant that the Chairman of the Appeal Board had a pecuniary interest in the matter and because of his bias had misconducted himself in sitting on the Appeal Board.

I am satisfied that the applicant had not been able to show such interest or bias. I am satisfied that the issue on the possibility of such allegation had been considered by the Appeal Board and the Appeal Board stated that it must be remembered that PORAM provides for consideration of disputes by members of the same trade and in the circumstances it was natural for members to know and have dealings with each other. This is a far cry from saying that either the Umpire or the Chairman of the Appeal Board had a direct interest in the matter being arbitrated upon or in the parties to the Arbitration.

I find that the applicant had failed to show an error on the face of the Award to entitle them to set aside the Award. I therefore grant the order sought by the respondent in terms of enclosure (9) with costs to the respondent.

SYED MAHADZIR BIN SYED ABDULLAH

v.

KETUA POLIS NEGARA & ANOR.

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[CIVIL SUIT NO. 357 OF 1982]
18 JUNE 1994

ADMINISTRATIVE LAW: Plaintiff seeking declaration that his compulsory retirement as a police inspector is of no effect and for consequential orders - Whether recommendation of the Medical Board relied upon by the defendant to retire the plaintiff was equivocal and thereby defective - Whether there was a breach of natural justice in that the plaintiff's fate was discussed behind his back - Whether plaintiff was given an opportunity to challenge the recommendations.

The plaintiff, a police inspector, was retired pursuant to ss. 8(2)(d) & 10(5) of the Pensions Ordinance 1951 (the Ordinance) after a Medical Board duly convened under Orders 18, 19 and 20 of the General Orders (Chapter F) had found the plaintiff to be suffering from the condition known as 'schizophrenia', an infirmity of the mind which rendered him incapable of discharging the duties of his office.

The plaintiff sought, a declaration that his retirement is of no effect and that he is still a member of the public service, and an order that the defendants do pay to him all arrears of pay, allowance and other emoluments due and owing to him from the date of the said purported retirement.

The plaintiff contended that the recommendation by the Medical Board which was relied upon by the defendant was equivocal in that while it recommended that the plaintiff be boarded out on psychiatric grounds, it went on to recommend further that the plaintiff "be placed in any position not requiring the handling of firearms eg. in administration". In the circumstances Counsel submitted that the recommendation was therefore defective and the decision to retire the plaintiff was null and void.

The plaintiff also contended that there was a breach of natural justice in that his fate was discussed behind his back and he was not given an opportunity to challenge the recommendations of the Medical Board.

Held:

[1] When a Medical Board is convened for the purpose of making recommendations on compulsory retirement of a government officer due to unsound mental health, such report or recommendation must - in fairness to the officer - necessarily be clear, unambiguous and unequivocal. A Medical Board ought to know that they are not treating a patient or diagnosing an illness or prescribing a medication, but they are doing something of serious import which profoundly affects the man's whole future and livelihood.

[2] Reading paragraph 2(c) in conjunction with paragraph 6 of the Medical Report, and after considering the evidence of DW1, one of the two doctors who comprised the Medical Board, the Court cannot but come to the conclusion that the essence and true intention of the Medical Report was that the plaintiff be allowed to work as a police officer if there was a post in the department, eg. administrative, which did not need the carrying of firearms.

[3] As such, it cannot be denied that the plaintiff was compulsorily retired on a report which was not only equivocal and ambiguous but was bereft of any element of finality as to whether he should be boarded out from the police force.

[4] In the circumstances, the defendants should not have acted on the report and the report being equivocal, the same principles as in criminal law should be followed by the defendants, being that the more favourable of the two recommendations should be adopted in favour of such officer. The purported compulsory retirement of the plaintiff was a nullity and was void and not in accordance with s. 10 of the Ordinance.

[5] According to s. 10(5)(c) of the Ordinance, the Director-General of Public Services "must be satisfied on medical evidence". It follows that he could be so satisfied only if, after a proper enquiry has been conducted by a duly appointed Medical Board, an unambiguous and unequivocal report or recommendation is submitted to him. Such enquiry, by its very nature, would necessarily require the exercise of functions of a quasi-judicial character which must thus conform to the rules of natural justice.

[6] In cases of compulsory retirement on health grounds, especially mental health, it is imperative that the person concerned be entitled to challenge and have a fair opportunity of correcting or contradicting the report or statements made and call his own medical consultant to give his opinion to the deciding person. His own medical consultant should be entitled to have before him all the material which the Board have.

[7] In the present case the plaintiff was not only not informed of his right to challenge the report or given any opportunity to correct or contradict same, his request for another medical examination by a psychiatrist to ascertain his mental health was also rejected. In the circumstances there was a breach of the rules of natural justice in the procedures employed to compulsorily retire the plaintiff and consequently his employment had not been validly terminated.

[8] Whilst it is true that in an ordinary case of master and servant, a declaration to the effect that the termination of service is null and void or that the contract of service still subsists should not be made, applying the principle enunciated in *Mallock v. Aberdeen Corporation* [1971] 2 All ER 1278 and *Fadzil bin Mohd Noor v. University Technologi Malaysia* [1981] 2 MLJ 196, the plaintiff here was clearly a public servant who had a status supported by statute and it is clearly open to the Court to make the declarations prayed for in the statement of claim.

Obiter:

Just as the public is entitled to expect greater efficiency, responsibility, accountability and fairness from civil servants, it is also in the public interest to assure 850,000 of them that the Courts have put in place certain safeguards in the form of clear guidelines, to ensure that none of them shall be deprived of their livelihood other than by law and in accordance with procedures carried out with the utmost fairness.

[Plaintiff's prayers in paragraphs 9(a), (b) and (e) of the statement of claim allowed].

Cases referred to:

Leong Kum Fatt v. Attorney General [1984] 2 MLJ 197 ***(refd)***

Pushpadevi Singam v. University of Malaya [1993] 2 AMR 41 ***(cit)***

Aziz bin Abdul Rahman v. AG Singapore [1979] 2 MLJ 93 ***(foll)***

B. Surinder Singh Kanda v. Government of the Federation of Malaya [1962] 28 MLJ 169, 172 ***(cit)***

Shamsiah bte Ahmad Sham v. Public Services Commission, Malaysia & Anor. [1990] 3 MLJ 364 ***(cit)***

V.C. Jacob v. The Attorney-General [1970] 2 MLJ 133 ***(cit)***
Abdul Raub v. The Attorney-General [1983] 1 MLJ 10 ***(cit)***
Re Godden [1971] 3 All ER 20 ***(foll)***
Ridge v. Baldwin [1964] AC 40 / [1963] 2 All ER 66 ***(foll)***
Francis v. Municipal Councillor of Kuala Lumpur [1962] MLJ 407 ***(refd)***
Mallock v. Aberdeen Corporation [1971] 2 All ER 1278, 1294 ***(foll)***
Fadzil bin Mohd Noor v. University Technologi Malaysia [1981] 2 MLJ 196 ***(foll)***

Legislation referred to:
Pensions Ordinance 1951, ss. 8(2)(d), 10(5)(a),(c)
Pensions Act, s. 7(2)(c) (Singapore)
Police Pensions Regulation 1971, Reg. 70(2) (UK)

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendants - Azmi bin Talib, FC

JUDGMENT

Vincent Ng Kim Khoay J:
The plaintiff who was compulsorily retired under s. 10(5)(c) the Pensions Ordinance 1951 as amended by Act A 423 (the Ordinance), sued the defendants for certain reliefs, which his Counsel Mr Karpal Singh agreed before me, should be limited to the prayer in paragraph 9(a), (b) and (e) of the statement of claim as expressed in the following terms:

> 9. (a) a declaration that the retirement of the plaintiff as a police inspector by the defendants is of no effect and that he is still a member of the public service.
>
> (b) an order that the defendants do pay to the plaintiff all arears of pay, allowance and other emoluments due and owing to him from the date of the said purported compulsory retirement.
>
> (e) cost

The pertinent averments in the plaintiff's statement of claim is as contained in paragraphs 4, 5(a), 5(b) and 8 which state as follows:

> 4. By a letter dated 15 October 1979 the Chief Police Officer, Penang informed the plaintiff that he was being retired with effect from 18 November 1979 on health reasons.
>
> 5. (a) By his own letter dated 23 October 1979 and a letter dated 17 October 1979 through his solicitors, the plaintiff appealed to the 1st defendant, and objected to the proposed enforced and compulsory retirement as the plaintiff had completely and perfectly recovered and that there were no grounds for his retirement for health reasons.
>
> (b) The plaintiff was not given particulars of the allegations against him nor was the plaintiff allowed or given an opportunity to be examined by competent medical specialists as to his health.
>
> 8. The plaintiff therefore avers that the purported retirement of the plaintiff on health grounds is null and void, inoperative and of no effect.

In their defence, the defendants admitted paragraph 4 and also admitted having received the letter of appeal dated 17 October 1979 but denied the rest of the plaintiff's averments. And the defendants further averred that the plaintiff was retired with effect from 18 November 1979 pursuant to s. 8(2)(d) and s. 10 of the Ordinance, after a Medical Board duly convened under Orders 18, 19 and 20 of the General Orders (Chapter F) had found the plaintiff to be suffering from the condition known as 'schizophrenia', an infirmity of the mind which rendered him incapable of discharging the duties of his office. It was further contended by the defendants that the plaintiff was informed, did attend and was duly examined on 6 January 1979 by a properly convened Medical Board whose members included a Consultant Psychiatrist, before it arrived at its said finding.

At the commencement of the trial on 13 May 1994, Counsel for the plaintiff Mr. Karpal Singh produced and tendered the agreed bundle of documents marked "AB". For convenience the disagreed bundle was also marked "DB" by the Court as the parties had during the trial agreed to treat documents DB 15 and DB 16 as agreed documents and to have them included in the agreed bundle.

At the trial, the plaintiff gave the following evidence. He was employed as a Probationary Inspector on 1 January 1971 and trained at Kuala Kubu Police College. He was confirmed as an Inspector in 1977. By a letter to him dated 15 October 1979 (AB 23), the Chief Police Officer, Penang informed him that he was being retired with effect from 18 November 1979 for health reasons. He was retired on the basis of a medical report dated 24 January 1979 (AB28). For the period of 10 years with effect from 18 November 1979 he received a monthly pension of only RM100.37. Thereafter, his monthly

pension was increased to RM222, which he had been receiving monthly until the day of the trial. He was dissatisfied with his compulsory retirement on health grounds as it was null and void, inoperative and of no effect and prayed for the reliefs as stated above. Only in January 1980 after his compulsory retirement was he able to secure a job as a security guard in Genting Holdings Casino Hotel and was paid RM180 per mensem. He resigned in October of the same year. Thereafter he worked as a cartoonist in Straits Echo from 1 January 1981 to end of May 1981 earning RM300 per mensem. He was also a free lance cartoonist earning about RM200 per mensem. With effect from 20 March 1994 he was employed by M/s Beterama Guard Security Services and was assigned to guard the Sessions and Magistrate Courts in Ampang, Kuala Lumpur on an income of RM950 per mensem.

When cross-examined by the learned Federal Counsel Encik Azmi, the plaintiff said that he had passed his Senior Cambridge Examination with Grade III and, in 1977 (as a private candidate) he had also passed the Higher School Certificate Examination. He admitted that he was examined by a Phychiatric named Dr. Yeoh Oon Hock on one occasion for 5 to 10 minutes and was given some medicine. He had also appeared before a Medical Board on 24 January 1979 comprising Dr. Yeoh Oon Hock and another a lady doctor, one named Dr. Ch'ng Siew Gim.

In re-examination, the plaintiff said that there were two recommendations in the report of the Medical Board dated 24 January 1979 (AB 28). The first recommendation (in paragraph 2) recommended that he be boarded out on psychiatric grounds and the second recommendation in the same report (in paragraph 6) said that he be allowed to be placed in any position not requiring the handling of firearms e.g. in administration.

At the hearing of the matter both parties agreed that the letters dated 7 April 1979 (DB 16) from Jabatan Perubatan Jiwa, Hospital Besar, Pulau Pinang to Ketua Polis, Jabatan Ketua Polis, Pulau Pinang and an another letter dated 21 March 1979 (DB 15) be considered as agreed documents and be included in the agreed bundle. That was the case for the plaintiff.

The defence called Dr. Ch'ng Siew Gim as its only witness. She gave the following evidence. On 24 January 1979 she together with Dr. Yeoh Oon Hock, who was then a Consultant Psychiatrist of the General Hospital, Penang had examined the plaintiff. She and Dr. Yeoh comprised a Medical Board convened at the request of the Chief Police Officer, Pulau Pinang on the ground that the soundness of the plaintiff's mind was doubtful; and both of them were the signatories of a report and recommendation dated 24 January 1979 (AB 28). The plaintiff was in fact examined earlier on 6 January 1979 and the patient was under observation and treatment from 6 March 1976 to 24 January 1979. The witness further said and I quote:

> I confirm that our findings were as stated under paragraph 2(c) (of AB 28). Paragraph 4(a) is also confirmed. I also confirm our rcommendation under paragraph 6. This is an additional recommendation. The reason for the recommendation for boarding him out is because of the necessity for him to use firearms as an Inspector.

In cross-examination she said:

> Our examination on 6 January 1979 was just to talk to him to determine his mental condition. On 24 January 1979 we made the recommendations based on our examination on 6 January 1979. I cannot recall whether he was present on 24 January 1979. The recommendation is that he could still be in the Police Force in a position which did not entail handling of firearms, as he was not medically unfit to be a police officer.

In re-examination by Encik Azmi the witness said that the 7 April 1979 letter was not a recommendation but was meant to clarify paragraph 6 of AB 28. She further said that, as it was the normal practice for the Board to inform an examinee as to the nature of his illness and the recommendations that the Board intended to make on him, the Board would have conveyed to the plaintiff such information on 6 January 1979; though not on 24 January 1979 when the Board sat again to finalise the report.

Lastly, when she was questioned again by Encik Karpal Singh through the Court she agreed that at the time she signed the report she was under the impression that a police officer needed to carry firearms.

With that the defendant closed his case.

Counsel for the plaintiff submitted on two grounds:

(i) The recommendation dated 24 January 1979 (AB 28) which had been relied upon by

the defendant was equivocal and were thereby defective. Even the clarification letter dated 7 April 1979 (DB 16) had said that the plaintiff could carry on work in a different post or capacity.

(ii) There was a breach of natural justice in that the plaintiff's fate was discussed behind his back and he was not given an opportunity to challenge the recommendations. Furthermore, the real recommendation was vide letter DB 16 and not letter AB 28 as there were discussions by the board with senior police officers on 7 April 1979 in the absence of the plaintiff.

In reply, the learned Federal Counsel Encik Azmi submitted that the Medical Board was duly convened under Order 18 and commenced under Order 19 Part III of the General Orders. And under s. 10(5)(a) of the Ordinance an officer may be required to retire from public service where the Director General is satisfied on medical evidence that that officer is incapable of discharging the duties of his office by reason of infirmity of mind or body which is likely to be permanent. The Board had found this to be so in its report under 2(C) of AB 28. This report must be read as a whole and paragraph 6 of AB 28 did not form a substantive part of the whole report due to its heading under words "Pandangan Tambahan". It was thus submitted that the Government has complied with the General Orders and the Pensions Ordinance.

The learned Federal Counsel had also contended that the role of the Court should only be limited to a review of the decision making process, that is the hearing and not the decision itself. (See *Leong Kum Fatt v. Attorney Genera*l [1984] 2 MLJ 197). To this, Mr Karpal Singh quite rightly pointed out that the decision making process started when the Medical Board was set-up and the decision making process was flawed in view of the infirmity. He also added that there should be strict compliance with the General Orders and the Pensions Ordinance.

I will consider the plaintiff's two grounds separately.

On the Plaintiff's first ground:

Section 10(5)(a) states as follows:

> The Yang di-Pertuan Agong, in the case of a federal officer, or the State Authority, in the case of a state officer, may require any officer to retire from the public service -
>
> (a) where the Director General or the State Secretary, as the case may be, is satisfied on medical evidence that the officer is incapable of discharging the duties of his office, by reason of infirmity of mind or body likely to be permanent;

On Mr. Karpal's submission that the date of recommendation by the Medical Board should be 7 April 1979 (DB 16) and not 24 January 1979, it is this Court's considered view that DB 16 was not a recommendation but a clarification letter written by the Board, following the request for such clarification by the Chief Police Officer, Pulau Pinang *vide* his letter of 21 March 1979 (DB 15). The Court would first of all have to examine the contents of the recommendation report (AB 28) to determine whether it was equivocal. Paragraph 2 (a) of AB 28 states that the plaintiff was examined on 6 January 1979 and paragraph 2(c) reported (in English) is as follows:

> This patient suffers from schizophrenia. He was admitted, treated and is now in remission and is on follow-up. As a recurrence of his illness remains a possibility **and as he has to handle firearms in his line of duty** (vide PR (Y) 5609 from the C.P.O. Penang), we recommend that he be boarded out as a police officer on psychiatric grounds.

However, further down under paragraph 6 of AB 28, the report also recommended as follows:

> We recommend that he be allowed or be placed in any position not requiring the handling of firearms e.g. in administration.

It is the contention of the learned Federal Counsel that because paragraph 6 of AB 28 is headed by the words "pandangan tambahan" which means additional view, this paragraph should be disregarded as not being a substantive part of the report. It was only incidental to para 2(c) of AB 28. On this issue it is essential for the Court to consider that the same material words "we recommend" were used by the Board in paragraphs 2(c) and 6. Furthermore, DW1 Dr. Ch'ng Siew Gim had also testified that para 6 of AB 28 was an additional recommendation as the Board had felt that the plaintiff could still be in the police force in a position which did not entail the handling of firearms because the plaintiff was not medically unfit to be a police officer *per se*. According to her the reason for the Board's

recommendation under 2(c) of AB 28 for boarding the plaintiff out, was because at that material time she had thought a police officer needed to carry firearms in order to hold such a position. As such, reading paragraph 2(c) in conjunction with paragraph 6, and after considering the evidence of DW1, the Court cannot but come to the conclusion that the essence and true intention of the report in AB 28 was that the plaintiff be allowed to work as a police officer if there was a post in the department, e.g. administrative, which did not need the carrying of firearms. As such, I agree with Mr. Karpal Singh that AB 28 was equivocal and ambiguous in content. Indeed, the letter dated 21 March 1979 from the Chief Police Officer, Pulau Pinang to the Medical Board had the further effect of confirming that the report was ambiguous and uncertain in nature as, by this letter the first defendant himself had sought clarification from the Board concerning the import of paragraph 6 *vis-a-vis* paragraph 4(b) of AB 28. Unfortunately, the Board's reply to DB 15 by letter dated 7 April 1979 (DB 16), not only did not clarify the position but confirmed their equivocal recommendations by stating as follows:

> Pegawai ini tidak boleh menjalankan tugas sebagai anggota polis **sebab beliau tidak dibenarkan membawa senjata. Walau bagaimanapun beliau tidak dilarang bekerja di Jabatan lain atau di jawatan lain di masa depan.**

The expression "sebab beliau tidak dibenarkan membawa senjata" confirms DW1's evidence that they made the first recommendation in 2(c) while labouring under the belief that all police officers had to carry firearms - *a fortiori* as this clarification letter had further repeated that the plaintiff was not precluded from working in another post. The expression "atau di jawatan lain" in DB 16, if read in conjunction with paragraph 6 of A8 28, could only mean "e.g. in administration".

As such, it cannot be denied that the plaintiff was compulsorily retired on a report which was not only equivocal and ambiguous but was bereft of any element of finality as to whether he should be boarded out from the police force. I hold that when a Medical Board is convened for the purpose of making recommendations on compulsory retirement of a government officer due to unsound mental health, such report or recommendation must -in fairness to the officer - necessarily be clear, unambiguous and unequivocal.

A Medical Board ought to know that they are not treating a patient or diagnosing an illness or prescribing a medication, but they are doing something of serious import and which profoundly affects the man's whole future and livelihood. Thus, I hold that the defendants should not have acted on a report which is equivocal such as in AB 28, especially as DB 16 repeated the equivocal contents in paragraphs 2(a) and 6 (both of which were confirmed as recommendations by DW1).

This is particularly true when, as in this case, the question is whether the officer is suffering from mental disorder. If the Board appointed under the General Orders decides, for example, that an officer is suffering from mental disorder of a schizophrenic type, it is difficult to think of anything, which is more damaging to the officer. He will suffer loss and in some cases and this I believe is one of them - very serious financial loss. Moreover, if a man is compulsorily retired on this ground, whatever his own psychiatrist may say, it would take a very sanguine prospective employer to offer him any further appointment. It would follow that if a recommendation or report is equivocal, the same principles as in criminal law should be followed by the defendants, being that the more favourable of the two recommendations should be adopted in favour of such officer. As such, I fail to comprehend why paragraph 6 of the report in AB 28 was not implemented in favour of the plaintiff. Such an approach would have been more consonant with a caring society, currently so ardently advocated. It is also common knowledge that there are many cases where government officers who, though partially incapacitated, are allowed on humanitarian grounds to continue employment in a different but lesser capacity.

The plaintiff had in his evidence said that besides being a cartoonist since his compulsory retirement, he had also worked as a security guard; eventually graduating to being a security guard under the employ of Messrs Beterama Guard Security Services and assigned to guard the Sessions and the Magistrates Court in Ampang, Kuala Lumpur. Thus, from hindsight it can be said that had the defendants adopted the second recommendation and had allowed the plaintiff to continue to work as a police inspector e.g. in an administrative capacity, their decision wouldn't have been amiss, considering the irony that the plaintiff is now guarding the very citadel of justice without any

complaints. It must however be added that here the defendants cannot be blamed for this unfortunate lack of focus on the part of the Medical Board on what was required of them. The defendants had in fact sought clarification from the Board but this drew a similar equivocal response.

I therefore find in favour of the plaintiff on his first ground and hold that the purported compulsory retirement of the palintiff was a nullity and was void and not in accordance with s. 10 of the Pensions Ordinance.

On the plaintiff's second ground:

I now come to deal with the second contention of the plaintiff. I recognise that there is a dearth of local cases on the issue of boarding out an officer on medical grounds. Save for the case of *Pushpadevi Singam v. University of Malaya* [1993] 2 AMR 41 which was decided on facts peculiar to the case, and the case of *Aziz bin Abdul Rahman v. AG Singapore* [1979] 2 MLJ 93, all the other cases cited by both Counsel dealt with dismissal on grounds of indiscipline. [See cases *Leong Kum Fatt v. Attorney General* [1984] 2 MLJ 197, *B.Surinder Singh Kanda v. Government of the Federation of Malaya* [1962] 28 MLJ 169, 172; *Shamsiah bte Ahmad Sham v. Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364, *V.C. Jacob v. Attorney-General* [1970] 2 MLJ 133, *Abdul Raub v. The Attorney-General* [1983] 1 MLJ 10.]

In *Aziz bin Abdul Rahman v. Attorney General (ibid),* the plaintiff was a police inspector in the Singapore police force. On 4 December 1974 he was transferred to the Woodbridge Hospital for an examination where he was detained until 12 December 1974 when he was granted leave by the said hospital at the request of his relatives. On 15 January 1975 the plaintiff was instructed not to report for duty and to obtain from the Medical Superintendent of the said hospital a certificate of fitness. The plaintiff thereafter went into hiding and stayed in Malaysia for some time. On 8 April 1975 a Medical Board was convened to examine the plaintiff. The plaintiff failed to appear at the first meeting and it was adjourned to 3 June 1975. The report of the second meeting stated *inter alia* that the plaintiff was suffering from paranoid disorder and that it was likely to prove permanent and the plaintiff was therefore unfit for duty as a police officer. In his letter of 16 June 1975 the Permanent Secretary of the Ministry of Home Affairs proposed to retire the plaintiff under s. 7(2)(c) of the Pensions Act (Singapore) "by reason of an infirmity of mind and that infirmity is likely to be permanent". On 20 August 1975 the President gave his approval to retire the plaintiff under s. 7(2)(c) of the Pensions Act.

The plaintiff therein claimed that he was denied his rights to be heard by the Medical Board and the provisions of s. 7(2)(c) of the Pensions Act were not strictly complied with. Choor Singh J. held in the favour of the plaintiff on both counts. Section 7(2)(c) of the Singapore Pensions Act reads similar to s. 10(5)(a) of our Pensions Act. This case cited with approval and followed the English case of *Re Godden* [1971] 3 All ER 20 and *Ridge v. Baldwin* [1964] AC 40 at 71. In *Re Godden,* Mr Godden, who was then the Chief Kent Police Officer, had made accusations against his superior officers some time in May 1970. In July 1970, indecent documents were found in Godden's desk. On 22 January 1971, on the grounds that the Inspector was suffering from a mental disorder of paranoid type and thereby permanently disabled, the Kent Police Authority, proceeded (under Reg. 70(2) of the Police Pensions Regulation 1971) to refer for decision to a duly qualified medical practitioner. Mr. Godden then sought certain reliefs including an order of *mandamus* to require the Kent Police Authority to disclose to the applicant and his advisers the relevant reports and other documents shown to the Authority's doctor. This case led to the *ratio classicus* of the Court of Appeal, which held that decisions leading to compulsory retirement must conform to rules of natural justice.

And, in the leading English case of *Ridge v. Baldwin (supra),* Lord Reid in the course of a long and important judgment emphasised that the duty to act in conformity with natural justice could, in some situations, simply be inferred from a duty to decide "what the right of an individual should be", and that where the occupant of an office was removable only for cause (e.g. disability) he had an implied right to prior notice and opportunity to be heard. Lord Reid observed at page 71:

> The principle *audi alteram partem* goes back many centuries in our law and appears in a multitude of judgments of Judges of the highest authority. In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as

> tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist.

I fully agree and support the principles enunciated in *Aziz bin Abdul Rahman (ibid), Re Godden (ibid)* and *Ridge v. Baldwin (ibid)* and hold that the same principles of natural justice applicable in the plethora of dismissal cases cited by Counsel should also be applicable to cases of compulsory retirement on medical grounds, as enquiries leading to compulsory retirement are of a quasi-judicial character and must conform to the rules of natural justice. It is appropriate here to quote what Lord Denning MR said:

> He is not saying merely whether a man is fit or unfit for duty. He is doing something which affects the man's whole future. Take this very case. A man's mental state is at issue.It affects not only his pension rights and payments to him. Its affects his standing in the community, his ability to get other work and the like. It is quite plain to me that the person concerned is entitled to have a fair opportunity of correcting or contradicting any statement made to his prejudice, and a fair oportunity of calling in his own medical consultant and getting him to give his opinion to the deciding person. His own medical consultant should be entitled to have before him all material which the other doctors have.

And further down the judgment at page 26 he said:

> But for myself I do not see that justice requires that Chief Inspector Godden should see it all himself ... it seems to me justice can fairly be done by letting his medical consultant see everything that any other doctor sees on the matter and give his advice accordingly.

According to s. 10(5)(c), the Director-General of Public Services "must be satisfied on medical evidence". It follows, as night follows day, that he could be satisfied only if, after a proper enquiry has been conducted by a duly appointed Medical Board - which would have to act strictly in compliance with the General Orders and the Ordinance (see *Aziz bin Abdul Rahman* - page 100 at paragraph H Lt.) - an unambiguous and unequivocal report or recommendation is submitted to him. And such enquiry, by its very nature, would necessarily require the exercise of functions of a quasi-judicial character which must thus conform to rules of natural justice. Though I must hasten to add that the Board need not conduct anything in the nature of a trial or hear the officer's legal advisers; nor that he is bound by the rules of evidence.

When we talk about principles to apply in cases of compulsory retirement on health grounds - especially mental health - we must not lose sight of the fact that the Board is doing something of profound import, which affects a man's whole livelihood and future; his mental state is at issue - nay, matters of the mind being ever so difficult to fathom or evaluate and on which individual specialists delving in the deeper realm of esoteric science often differ; his standing in a community and his ability to get other work and the like is also affected; his family has lost his financial support; indeed with such gloomy prospects, it is very close to the toll of the death knell over him. All such considerations make it imperative that the person concerned be entitled to challenge; to have a fair opportunity of correcting or contradicting the report or statements made and calling his own medical consultant to give his opinion to the deciding person. His own medical consultant should be entitled to have before him all the material which the Board have.

In the case at hand, the plaintiff had, by his letter dated 23rd October 1979 to the Inspector General of Police, Bukit Aman, Kuala Lumpur (AB 8) asserted that the sickness he was experiencing was only of a temporary and not permanent nature such as is defined under the General Orders. Most importantly, he had also requested for a re-examination by another psychiatrist. This was denied to him. Furthermore, DW1 said that the plaintiff was examined on 6 January 1979 by the Board only asking him a few questions. Though, she had also said that, based on normal practice, the Board may have indicated to the plaintiff on 6 January 1979 their intended recommendations, this was at any rate not done on 24 January 1979, which was the material date when the report and recommendation was in fact made. In the event, the plaintiff was not only not informed of his right to challenge the report or given any opportunity to correct or contradict same, his request (*vide* his letter dated 23 October 1979 (AB 8)) for another medical examination by a psychiatrist to ascertain his mental health was also rejected. Notably, in AB 8, he had claimed that he was only suffering from a temporary mental condition due to his circumstances but had completely recovered in February 1979 and was no longer suffering from any ailment. Indeed, he

himself wrote and signed this letter. Thus it is clear - and I have no hesitation in holding - that there was breach of the rules of natural justice in the procedures employed to compulsorily retire the plaintiff. Consequently, his employment had not been validly terminated. In the event, the plaintiff succeeds also on this second ground.

Lastly, I recognise that in an ordinary case of master and servant, a declaration to the effect that the termination of service is null and void or that the contract of service still subsists should not be made. See *Ridge v Baldwin* [1963] 2 All ER 66 and *Francis v. Municipal Councillor of Kuala Lumpur* [1962] MLJ 407. However, in M*allock v. Aberdeen Corporation* [1971] 2 All ER 1278, 1294, Lord Wilberforce held that the point in *Ridge v. Baldwin (ibid)* - which held that it was not open to the Court to grant a declaration that the termination of service was null and void - is only applicable in "cases in which there is no element of public-employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection." In cases where such an element is present, Lord Wilberforce pointed out that "there may be essential procedural requirements to be observed and failure to observe them may result in a **dismissal being declared void".** *Mallock v. Aberdeen Corporation (ibid)* was cited with approval in the then Federal Court decision in *Fadzil bin Mohd Noor v. University Technologi Malaysia* [1981] 2 MLJ 196 wherein Raja Azlan Shah CJ (as he then was) had held that the appellant therein - who was an Assistant Lecturer employed by the University - **had "a status supported by statute"**. And if that right is violated as happened there, "then the Court may allow **declaratory relief, enabling him to retain his employment,** and continued eligibility to be paid his salary and all emoluments from the date of the purported dismissal."

Applying the principle enunciated in *Mallock (ibid)* and *Fadzil bin Mohd Nor (ibid),* which I wholly agree with, and as the plaintiff here was clearly a public servant who had a status supported by statute (for want of a better term he could be called a statutory servant), it is clearly open to this Court to make the declaration under para 9(a), under the prayers of the statement of claim. The following circumstances also make it eminently appropriate for this Court to exercise its discretion on prayer 9(a) in favour of the plaintiff: the plaintiff was not in any manner the cause of his unlawful compulsory retirement; he was not the cause of the (about) 15 years delay in bringing this matter up for trial; he is now about 44 years of age; he was, at the time of his enforced retirement, clearly not unfit to be a police inspector *per se.* All these circumstances in the present case made it just and proper that, upon my aforesaid findings in respect of the plaintiff's two grounds, this Court ought to, which I do, grant the plaintiff's prayers 9(a), (b) and (e) (spelt out above) asked for in his statement of claim.

One often reads of instances in the former USSR where certain of its unfortunate citizens have been conveniently removed from circulation or deprived of their station in life through the expediency of declaring the victim insane or schizophrenic. Nay, had it not been for the curial intervention of Lord Denning MR, Salmon & Karminski LJ sitting in the Court of Appeal in the case of *Re Godden (ibid)* this would also have happened even in England.

Malaysians are fortunate that this has never happened here; we love this country too much to allow a situation even to begin to slide down the path of the Russian abyss.

Nonetheless, just as the public is entitled to expect greater efficiency, responsibility, accountability and fairness from civil servants, it is also in the public interest to assure 850,000 of them that the Courts have put in place certain safeguards in the form of clear guidelines, to ensure that none of them shall be deprived of their livelihood other than by law and in accordance with procedures carried out with the utmost fairness. They are as follows:

(1) The General Orders and the Pensions Act must be strictly complied with.
(2) The recommendations of the Medical Board has to be unambiguous, unequivocal and pointed on the need to compulsorily retire the employee. How else could the Director General or State Secretary be "satisfied on the medical evidence".
(3) The employee must be given a fair opportunity to correct and contradict the recommendation of the Medical Board, and he must be informed of such right. The rationale here is simple in as much as it is fundamental: the rights of a civil servant whose employment is to be terminated due to ill-health should not be less than another to be dismissed on grounds of misconduct.

Earlier, during the hearing, Counsel had very roughly calculated the value of the plaintiff's claim to be well over RM100,000. However, even should this amount be less than RM100,00 this Court would readily grant the defendants leave (if sought) as this case involves principles of importance and a decision of the Supreme Court be to public advantage.

S. YUVARAJAN S/O SREEAMULU & ANOR.

v.

ANTHONY A/L MARTIN MANIKAM

HIGH COURT, SHAH ALAM
DATO' RANITA HUSSEIN JC
[CIVIL SUIT NO. 22-518-93]
20 MAY 1994

INJUNCTION: Application by plaintiff for an injunction to restrain defendant from infringing the plaintiffs' trade mark and from passing off goods - Damages-Adequacy of-Balance of convenience.

TRADE MARKS: Application by plaintiffs for an injunction to restrain defendant from infringing the plaintiffs' trade mark and from passing off goods - Whether defendant infringed trade mark of plaintiffs' - Section 38 of Trade Marks Act 1976 - Whether defendant guilty of passing off - Whether get up used by defendant deceptive - Defendant alleging that plaintiffs' current mark not the original trade mark registered - Serious issues to be tried.

The plaintiffs were the registered proprietors of the trade mark "Chop Sipoth" in relation to their trade in sarongs and had established a substantial reputation in their trade mark and get up,having been in the trade for the past 39 years. The defendant had only recently entered the sarong market and submitted an application on 3 March 1993 for the registration of the trade mark "Chop Sipot Mas"

The plaintiffs initial *ex-parte* application for an injunction to restrain the defendant from infringing their trade mark and from passing off goods and other ancillary orders thereto inclusive of an Anton Pillar order was granted and subsequently extended twice.

The plaintiffs contended that the defendant's trade mark was substantially similar, if not identical to theirs. In consequence, they alleged an infringement of their trade mark and an act of passing off.

Held:

[1] The defendant's trade mark and get up is substantially similar to that of the plaintiffs. However there are serious issues to be tried as the defendant challenges the plaintiffs' current trade mark as not being the original one registered by them.